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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1328

KAISER STEEL CORPORATION,
a Nevada Corporation,
Petitioner,

vs.

W. S. RANCH COMPANY,
a New Mexico Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS BELOW

The opinions of the Court of Appeals, on the merits and on motion to stay proceedings, are reported at 388 F.2d 257, 262. These opinions and the unreported opinion of the District Court are printed in the Petition, Appendix B.

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition.

QUESTION PRESENTED

In this diversity action, did the Court of Appeals abuse its discretion by refusing to abstain pending determination by the state courts of a clear question of state law, where the declaratory judgment suit raising the question was instituted and abstention requested only after the Court had rendered an adverse decision on the merits?

STATUTES INVOLVED

The following constitutional and statutory provisions, in addition to those printed in Appendix A to the Petition, are involved:

U. S. Const. Art. III, § 2: "The judicial Power shall extend . . . to Controversies . . . between citizens of different States . . . ."

28 U.S.C. § 1332(a) (1964): "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States . . . ."

STATEMENT OF THE CASE

The procedural posture of the case is adequately presented in the Petition, pp. 3-5. However, additional facts deemed necessary to an adequate understanding of the issue involved, are set forth in the Argument below.

ARGUMENT

Petitioner has dutifully and faithfully tracked the requirements of Rule 19 of this Court. But the purely formalistic repetition of the considerations governing review on certiorari to a court of appeals cannot fill the void in a case wholly lacking in those considerations. That this is such a case will be quickly seen once the bare-bones structure of Petitioner's "Statement" is fleshed out with the factual background giving rise to this controversy.

Some time prior to April 28, 1966, Kaiser Steel Corporation ("Kaiser") entered into a long-term lease with a landowner in Colfax County, New Mexico, and constructed on the leased lands a coal mine (R. 12). In connection with its mining and processing operations at this mine, Kaiser required a supply of water. Presumably because any water rights available to the leased land were nonexistent or insufficient, it was necessary for Kaiser to purchase water rights appurtenant to land located some fifteen miles downstream from Respondent's ("Ranch's") land. (See Opinion, Supreme Court of New Mexico, Petition, p. A31.)

After purchasing these rights, Kaiser applied to the New Mexico State Engineer for a change in the point of diversion of the water from its original location to a point on Ranch's land, several miles southerly from the lands occupied by Kaiser (R. 13). This application was approved by the Engineer, and his approval was ultimately confirmed by the state Supreme Court (Opinion, Petition, p. A30). This approval meant that Kaiser was legally entitled to withdraw water from the new point of diversion on Ranch's land and to apply it to beneficial use at the coal mine several miles to the north.

It has never been contended, however, as indeed it could not be, that this action on the part of the State Engineer and the state courts carried with it the right to use Ranch's *land* for the purpose of transporting the water from point of diversion to place of use. In fact, the State Engineer's regulations provided, at the time Kaiser's application was approved, that

> "Rights-of-way for the works under any permit must be owned or controlled without controversy by the permittee. Conclusive proof in the form of an affidavit or certified copy of the right-of-way agreement should be filed with the State Engineer before the Certificate of Construction is issued."[1]

Nevertheless, on April 28, 1966, Kaiser entered upon Ranch's land and began construction of its water-diversion works—laying a pipeline, drilling wells and conducting other incidental activities (R. 2). This entry continued in the face of notification both before and after its initiation that it was unlawful and without right; it therefore constituted an intentional, willful, malicious and wanton disregard of Ranch's rights (R. 2-3).

As appears from the Petition, Kaiser purported to justify this occupation of a portion of Ranch's land by claiming the power of eminent domain. The statute relied upon was Section 75-1-3, New Mexico Statutes Annotated (1953 Compilation) (quoted at pp. A1-A2 of the Petition), which contains this sentence with reference to rights of way acquired by condemnation for pipelines or other works for the conveyance of water:

> "Such land and right of way shall be acquired in the manner provided by law for the condemnation and

1. State Engineer, *Manual of Rules and Regulations Governing the Appropriation and Use of the Surface Waters*, ch. V, p. 20 (rev. 1953). See also note 9 *infra* and *Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 78 N.M. 41, ——, 428 P.2d 15, 22 (1967).

taking of private property in the state of New Mexico for railroad, telegraph, telephone and other public uses and purposes."

It is undisputed that the "manner provided by law" for the condemnation of property for railroad, etc., purposes is that detailed in N.M. Stat. Ann. sections 22-9-1 through 22-9-21. These statutory provisions establish a typical procedure for exercising the power of eminent domain by instituting a court action and paying the damages assessed. And they contemplate that a condemnor may gain the right of entry into the condemned premises during the pendency of the action by paying into court the damages preliminarily assessed by the court-appointed appraisers.[2]

Thus, on April 28, 1966, two courses were open to Kaiser: it could negotiate with Ranch for the needed pipeline right of way, or it could file an action in the state district court to condemn the easement. It did neither.

One can only speculate about the reasons prompting Kaiser's adopted course of action. Negotiation, of course, can be a time-consuming and expensive alternative. As to judicial condemnation, Kaiser must have been intimately familiar with the holding in *Gallup American Coal Co.* v. *Gallup Southwestern Coal Co.*, 39 N.M. 344, 47 P.2d 414 (1935): that a coal mining company is precluded by the state constitution from exercising the power of eminent domain in aid of its coal mining operations. The second alternative, therefore, threatened either complete failure or, at best, a period of litigation in the state courts before the easement could be secured. Both alternatives placed a roadblock of inconvenience in what can be assumed to have been, for Kaiser, a matter of some urgency: to get the mine open and into production.

2. See N.M. Stat. Ann. § 22-9-18.

And so, true to the tradition of the Old West, Kaiser chose to take first and litigate later.

Confronted with this invasion of its land and what to it was a palpable invasion of its rights, Ranch had either to shoulder the burden of going forward with a lawsuit or succumb to the assertion of naked power against it. Ranch decided to sue. Having so decided, Ranch faced the next question: where to sue?

One hundred seventy-seven years before, the Congress of the United States had provided a federal forum[3]—a forum that was available still.[4] Of course, there was also available a state-court forum in Colfax County—the county to which Kaiser Steel Corporation had so recently promised an economic boost in the form of a new coal mine. Ranch chose the federal court.

Kaiser responded to the complaint in trespass by asking that it be dismissed, "the specific point relied upon" being that "plaintiff's exclusive remedy, if any, is under" the state inverse condemnation statute[5] (R. 11). Thus the issue of the availability of the power of eminent domain to Kaiser was brought into focus.

It seems fair to assume that Kaiser was not altogether confident about the resolution of that issue, for appended to its memorandum brief in the District Court, apparently as a hedge against an unfavorable decision, was the suggestion that if the district judge disagreed with Kaiser, he should not decide at all but should "abstain." The District Court, however, agreed with Kaiser and dismissed the action for failure to state a claim upon which relief could be granted (R. 20).

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3. Act of Sept. 24, 1789 (First Judiciary Act), ch. 20, § 11, 1 Stat. 78.

4. 28 U.S.C. § 1332(a) (1964).

5. N.M. Stat. Ann. § 22-9-22, printed at pp. A2-A3 of the Petition.

On appeal, Ranch renewed its position that the statute was unconstitutional under the state constitution[6] if applied to enable Kaiser to condemn land in aid of coal mining and, in addition, attacked the District Court's conclusion (R. 14-15) that Kaiser, even if clothed with power to condemn, was immune from liability in trespass.

These two state-law issues—power to condemn and exclusiveness of the inverse condemnation remedy—were argued at length in Ranch's brief in chief, in Kaiser's answer brief, in Ranch's reply brief, and in full-dress oral argument before the Court of Appeals. By then, however, Kaiser had recovered the confidence it had lacked in the District Court, and so no suggestion was advanced that the trial court had erred in failing to abstain or that the Court of Appeals should now defer to a state tribunal.

In a unanimous opinion noteworthy for its painstakingly detailed consideration of numerous state Supreme Court decisions—both their holdings and their rationale—the Court of Appeals held with Ranch on the question of the state-law constitutionality of Section 75-1-3. The Court found itself unable to accept the patent fiction that a use of land in aid of coal mining, though declared by the state Supreme Court to be a private use for purposes of eminent domain, could somehow be transformed into a public use if a water pipeline were buried in the soil. And it found no indication that the state court would now accept this form of legal alchemy; on the contrary, it found that the court had, over and over again, consistently ruled that the character of a use of land as public or private must be measured by the ultimate use to which the land is devoted. (Opinion, pp. A16-A17 of Petition, 388 F.2d at 260-61.)

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6. N.M. Const. Art. II, § 20: "Private property shall not be taken or damaged for public use without just compensation."

Then came the frantic effort to salvage something. In a *blitzkrieg* of actions, motions and petitions, Kaiser instituted a declaratory judgment action in the Colfax County Court and simultaneously filed its motion to stay the proceedings, as well as a petition for rehearing. On the same day (October 30, 1967), the Cherokee & Pittsburg Coal and Mining Company (Kaiser's lessor) and the State Engineer filed their motions for leave to appear as *amici curiae* in support of Kaiser's position. That the Court gave this desperate, last-ditch effort fairly serious consideration appears from the absence of a ruling until February 1, 1968. But on that day the Court of Appeals exercised its discretion, refused to abstain and denied the pending motions.

POINT I

The Court of Appeals Correctly Decided an Issue of Clearly Settled State Law.

Does the judicial power of the United States which extends "to Controversies . . .—between citizens of different States . . ."[7] embrace the decision of issues of both law and fact, or only issues of fact? Since a limitation to fact issues only has never been suggested, diversity cases must inevitably arise in which resolution of the controversy turns on decision of purely state-law questions.[8] And it is certain that virtually no such case is controlled by a prior state pronouncement in a completely indistinguishable state-court lawsuit, for otherwise the federal-court suit would never have been brought. But it is equally true that there are numerous diversity cases in which the fed-

7. U. S. Const. Art. III, § 2.

8. "Resolution of local law questions is implicit in diversity of citizenship jurisdiction. Since *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, the federal courts under that head of jurisdiction daily have the task of determining what the state law is." *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 426 (1964) (Douglas, J., concurring).

eral court finds itself left with the "inescapable impression"—to use Chief Judge Murrah's phrase (Opinion, p. A17 of Petition, 388 F.2d at 260-61)—that the state law requires a particular result.

Thus, in the case at bar, although it acknowledged that the "precise question" of New Mexico law had not been presented to the state courts, the unanimous Court of Appeals was led, "inescapably," to the conclusion that *Gallup American Coal Co.* v. *Gallup Southwestern Coal Co., supra,* was controlling.

There is no need to review the court's thoroughgoing analysis of the several state Supreme Court cases consistently limiting the applicability of Section 75-1-3 to "irrigation and other domestic purposes"[9] and focusing on the ultimate use of a taking in determining its public or private character. The opinion of the chief judge stands on its own feet and will convincingly rebuff any attempt to read into those cases a contrary rationale. Nevertheless, in order to emphasize the clarity of the state decisional law, and to controvert Kaiser's statement that the Court of Appeals' ruling implies "some distinction between irrigation, mining, and other beneficial uses of water, all of which are conspicuously absent from New Mexico law" (Petition, p. 8), the decisive language from the *Gallup American* case bears repeating:

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9. This limitation originated in the early case of *Albuquerque Land & Irr. Co.* v. *Gutierrez,* 10 N.M. 177, 231, 61 Pac. 357 (1900), *aff'd,* 188 U.S. 545 (1903). It has long been recognized in the State Engineer's administrative interpretation of the statute. The Engineer's regulations provide: "In New Mexico the diversion and distribution of water thru constructed works *for irrigation and other domestic purposes* is a public use and an appropriator may *exercise* the right of eminent domain *to acquire* necessary rights-of-way for canals, ditches, pipe lines, reservoirs, dams, etc." State Engineer, *supra* note 1, at 21. (Emphasis added.) Note also the administrative recognition that *acquisition* of a right of way by an *exercise* of eminent domain is necessary before the pipeline, etc., may be installed.

> "As an essential or paramount industry, . . . [coal mining] does not seem to us to belong in a class with . . . *irrigation* in . . . New Mexico, as appraised in . . . City of Albuquerque v. Garcia, 17 N.M. 445, 130 P. 118, and other New Mexico cases. We consider it rather in a class with the timber or lumbering industry which was involved in the Threlkeld Case.[10] * * *
>
> "It follows that, in so far as the statute impliedly declares a public use in the business or industry of coal mining, it is violative of N.M. Const. art. 2, § 20 . . . ."[11]

The distinction between irrigation and mining, which Kaiser asserts was "conspicuously absent from New Mexico law," was expressly drawn by the state Supreme Court in the *Gallup American* case. Not, to be sure, with reference to beneficial uses of water, for no one has ever questioned that the use of water for mining is a beneficial use. But what was involved in *Gallup American* was not, as it was not in the instant case, characterization of uses as *beneficial* or not for water law purposes; rather it was, as it was in this case, characterization of uses as *public* or not for purposes of eminent domain. The Court of Appeals refused to be led astray by Kaiser's clever attempt to confuse the two questions, and rightly held that its decision was controlled by the previous state declaration.

POINT II

The Court of Appeals' Refusal to Abstain Was a Proper Exercise of Discretion and Therefore Wholly Consistent with the Decisions of This Court.

In *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959), so heavily relied on by Petitioner, the

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10. *Threlkeld* v. *Third Judicial Dist. Court*, 36 N.M. 350, 15 P.2d 671, 86 A.L.R. 547 (1932) (lumbering held not a "public use" under N. M. Const. Art II, § 20).

11. *Gallup American Coal Co.* v. *Gallup Southwestern Coal Co.*, *supra*, 39 N.M. at 348, 47 P.2d at 416. (Emphasis added.)

Court held that abstention by the district court in the circumstances there involved was a proper exercise of "a fair and well-considered *judicial discretion* in staying proceedings . . . ."[12] This clearly implies for diversity cases what was established from the outset for federal-question cases:[13] that the question whether or not to abstain is answerable, within limits, by an exercise of discretion on the part of the court to which it is addressed.

In the instant case the question of abstention was not addressed in any meaningful sense to the District Court. True, it was mentioned in Kaiser's memorandum brief in that court and, true, the district judge could have considered it *sua sponte*. But the motion to dismiss was expressly confined to Ranch's alleged failure to state a claim for relief, and in any event no review of the trial court's failure to abstain was sought in the Court of Appeals and none is sought here.

Consequently, abstention became a live issue only when the Court of Appeals was asked to stay its hand; it is the first and only court whose discretion has been invoked to consider that issue. For this Court to grant the relief re-

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12. 360 U.S. at 30. (Emphasis added.) The Court also characterized the district court's action as "a conscientious exercise by the federal district judge of his *discretionary power* . . . ." *Id.* at 27 n. 2. (Emphasis added.)

13. See *Railroad Comm'n.* v. *Pullman Co.*, 312 U.S. 496, 500-01 (1941), particularly the passage quoted at p. 13 of the Petition. See also *Baggett* v. *Bullitt*, 377 U.S. 360, 375 (1964): "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exists the 'special circumstances,' . . . prerequisite to its application must be made on a case-by-case basis."

Some commentators applaud the recognition of this area of trial-court discretion and advocate its expansion. See, *e.g.*, Wright, *The Abstention Doctrine Reconsidered*, 37 Tex. L. Rev. 813, 825 (1959); Note, *Abstention: An Exercise in Federalism*, 108 U. Pa. L. Rev. 226, 251 (1959).

quested by Kaiser would thus require a holding that the Court of Appeals abused its discretion, for surely a refusal to abstain, if the question falls within the permissible bounds of discretion at all, is just as much an exercise of that discretion as is a decision to abstain.[14]

Perhaps, however, the circumstances of this case remove it from the area properly referable to judicial discretion. If so, then they clearly place it on the side of those decisions holding that a federal court has no discretion to decline to exercise its properly invoked jurisdiction.[15] Of special pertinence here is *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959). The question there was "whether the District Court had discretion to abstain from the exercise of jurisdiction in the circumstances of this case." 360 U.S. at 188. The answer was that it did not.

One analyst suggests[16] that the apparent conflict between *Thibodaux* and *Mashuda* can be reconciled in a liberal grant of discretion to abstain or not to abstain in the trial court—a discretion limited, nonetheless, by the necessity for "exceptional circumstances," found absent in *Mashuda*. Whether or not this basis for reconciliation exists, *Mashuda* seems far closer to the present case than *Thibodaux*. In the first place, as has been shown above, the "unsettled state law" circumstance, of such crucial importance in *Thibodaux*,[17] is lacking here. As in *Mashuda*, the relevant state law is clear that eminent domain cannot be exercised for private purposes. Additionally, the state law is

14. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328-29 (1964).

15. *E.g.*, *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959); *Propper* v. *Clark*, 337 U.S. 472 (1949); *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943).

16. Note, 108 U. Pa. L. Rev. 226, 247-48 (1959).

17. See *Louisiana Power & Light Co.* v. *City of Thibodaux*, *supra*, 360 U.S. at 31 (Stewart, J., concurring).

likewise clear that coal mining is just such a private purpose.[18] Whereas the state statute in *Thibodaux* had never been judicially construed, the statutory and constitutional provisions here have undergone judicial scrutiny a number of times,[19] and the pattern which they form was clearly discernible by the Court of Appeals.

A second similarity between *Mashuda* and this case lies in their parallel procedural postures. Both cases challenge the validity of expropriations of property; both are attempts to oust the purported condemnor from its illegal occupancy. Thus, although both involve issues of state eminent domain law, neither is itself a condemnation action. *Thibodaux*, however, was an actual eminent domain proceeding, begun in state court and removed to federal court. The significance of this distinction is that it vitiates the importance claimed in the Petition for the fact that this case concerns the power of eminent domain. As the Court observed in *Mashuda*, that fact "no more justifies abstention than the fact that [the case] involves any other

18. In *Mashuda* the Court characterized as "purely factual" (360 U.S. at 190) the question whether land leased by the county to a private corporation was devoted to public or private use. But is that question so necessarily one of "fact" rather than "law," particularly in view of the dissenting opinion's notation (360 U.S. at 199 n.1) that the leased land was to be used in connection with the county's enlargement of the airport? Arguably, the *Mashuda* question could have been treated as at least partly "legal" and therefore one as to which, for all we know, the state law may have been unsettled. In any event, the notoriously elusive law-fact dichotomy would seem to be a slippery footing upon which to predicate a hard-and-fast rule. This suggests another consideration favoring the recognition of discretion in the trial court.

19. See the Court of Appeals' Opinion, Petition, pp. A14-A16, A18, 388 F.2d at 259-60, 261. This difference between situations with little or no judicial precedent bearing on the state-law issue and those where related or analogous state decisions are available to guide the federal court's determination has been cited as a second ground for reconciling *Thibodaux* and *Mashuda*. Note, 108 U. Pa. L. Rev. 226, 249 (1959). "For this essentially deductive task the federal courts are as well equipped as are the state courts themselves." *Ibid.*

issue related to sovereignty." (360 U.S. at 192.) To the extent that the *Thibodaux* pronouncement on the "special nature" of eminent domain retains any vitality after the refutation in *Mashuda*,[20] the procedural alignment of this case with the latter makes that pronouncement inapposite.

Kaiser's assertions to the contrary notwithstanding, there is a third ground of similarity between the instant case and *Mashuda*:

> "[A]djudication of the issues in this case by the District Court would present no hazard of disrupting federal-state relations. The respondents did not ask the District Court to apply paramount federal law to prohibit state officials from carrying out state domestic policies, nor do they seek the obvious irritant to state-federal relations of an injunction against state officials." 360 U.S. at 189-90.

The considerations favoring abstention in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951), are simply not present here.

The primary factor motivating both *Burford* and *Alabama* was the desire to avoid federal-court interference with state administrative action, typically that of a regulatory commission.[21] This clearly appears from the detailed examination in both opinions of the respective regulatory programs involved. Avoidance of such interference accomplishes several objectives: it prevents the "ob-

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20. When the *Thibodaux* opinion is read in the historical context of the equitable origins of the abstention doctrine, the suggestion is not at all unwarranted that "The Court's emphasis . . . on the special nature of a state eminent domain proceeding may be read as no more than a response to objections that abstention was not appropriate in that case because the relief sought was not equitable in nature." Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 Colum. L. Rev. 749, 763-64 (1959).

21. See Note, 59 Colum. L. Rev. 749, 759 (1959), stating that the cases have been limited to this situation.

vious irritant," referred to in *Mashuda*, of a federal injunction against state officials; it respects the state's referral of complex local problems to a specialized agency; and it preserves the important state-court function of review of the agency determinations.[22]

The case at bar presents none of these considerations. Although Section 75-1-3 is one of the sections constituting the state's Water Code, to describe it as part of a "comprehensive code" for regulating the state's water resource is only to mislead. Unlike the state statutes relating to rights in *water*, this provision for acquiring *land* is administered by no regulatory officer or agency. The State Engineer is in no way entrusted with its administration, and by its own terms the statute is to be invoked in a judicial action by the particular water user claiming its benefit.

The superficial resemblance between *Burford* (oil) and this case (water) should not be permitted to obscure their fundamental differences. The lower courts were not here concerned with the sometimes difficult hydrological problems that are the province of the State Engineer, for all that is involved is the availability of an easement by condemnation of another's land. To paraphrase *Mashuda*, surely a right of way for water transportation

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22. See id. at 761. The *Alabama* form of abstention also undoubtedly encompasses some of the policy considerations underlying the common administrative-law requirement of exhaustion of administrative remedies. See Note, 16 Wes. Res. L. Rev. 937, 941-42 (1965).

Another prominent factor motivating *Burford* and *Alabama* was the principle, derived from *Pennsylvania* v. *Williams*, 294 U.S. 176 (1935), that a federal court has discretion to withhold unnecessary and extraordinary equitable relief. See *Burford* v. *Sun Oil Co.*, *supra*, 319 U.S. at 334-35 (Douglas, J., concurring). This has led to the conclusion that the two cases are not "true" abstention cases. Gowen & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 Tex. L. Rev. 194, 198-200 (1964).

> "is no more mystically involved with 'sovereign prerogative' than a State's power to regulate fishing in its waters, . . . its power to regulate interstate trucking rates, . . . a city's power to issue certain bonds without a referendum, . . . its power to license motor vehicles, . . . and a host of other governmental activities . . . ." 360 U.S. at 192.

For the same reasons, Kaiser's dire predictions of the "adverse effect" the Court of Appeals' decision will have on the "economic development" of the state are devoid of substance. Even if such predictions were remotely likely to be realized, they would not excuse a diversity court from following a clear expression by the state Supreme Court that the policy embodied in the state constitution has, in this instance, to be given primacy. The state court has held that a coal mining company cannot condemn private property. Apart from the total lack of any indication that this holding has itself had an "adverse effect" upon the state's economic development, the policy choice, if there is one, has been made. Surely it is not too much to ask a federal court to effectuate that choice in a different factual setting.

The only substantial consideration favoring abstention raised by the Petition is the fact that a state statute has been declared unconstitutional in a particular application. Were it not for this factor there would be no basis at all for characterizing the Court of Appeals' refusal to abstain as discretionary; it would be mandatory.

But the nature of the Court of Appeals' declaration must not be forgotten; this is no instance of a confrontation between federal policy and state policy; the District Court was not asked (as it was not in *Mashuda*) to apply "paramount federal law" in striking down a state statute. Hence, one of the very strong policy underpinnings of the *Pullman*

doctrine—avoidance of needless friction with state policies[23] —is entirely absent. It is not enough that a unit of the federal judicial system, as opposed to that of the state, has ruled against the statute as here sought to be applied, for (again as in *Mashuda*) the Court of Appeals was simply "applying state law in the same manner as would a state court." That the state law to be applied was found in the state constitution, as interpreted by the state's highest court, surely does not mitigate the duty to apply it. Had such interpretation been absent, abstention to procure it might have been justified; but with the clear policy of the state's judiciary already enunciated, the Court of Appeals' decision to proceed was clearly a proper use of its discretionary power.

That the Court of Appeals correctly exercised its discretion is apparent in a fourth and final similarity between *Mashuda* and this case:

> "The undesirability of a refusal to exercise jurisdiction in the absence of exceptional circumstances which clearly justify an abstention is demonstrated by the facts of this case. Respondents have consumed considerable time and expense in pursuing their claim that their property has been unlawfully taken. To order them out of the federal court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties. This would be a particular hardship for the respondents, who, besides incurring the added expense, would also suffer a further prolonged unlawful denial of the possession of their property if ultimately they prevail against the County and its lessee. It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them 'that promptness of decision which in all judicial actions is one of the elements of justice.'" 360 U.S. at 196-97.

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23. See Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 Harv. L. Rev. 604, 605 (1967).

Related to these considerations is Kaiser's statement that resort to abstention is not precluded because of the tardiness with which the issue was raised. No doubt, as an abstract proposition of law, this is true; but can it reasonably be contended that the failure to file the now pending declaratory judgment suit and to raise the abstention issue until eighteen days after the court's ruling on the merits should not have exerted a powerful influence on the way in which the court determined to exercise its discretion?[24]

POINT III

Any Conflict Among the Circuits Is a Conflict Only As to the Permissible Range of Discretion to Abstain, and This Case Is Inappropriate to Resolve Any Such Conflict.

If it is true that there is an area of discretion within which a federal court may properly decide to abstain or not to abstain, depending on its assessment of the several competing considerations involved, then the mere fact that one court in a diversity case chooses to postpone jurisdiction while another chooses to proceed cannot serve as a basis for finding a "conflict" between the two choices. Certainly any such "conflict" is not of the sort requiring resolution by the United States Supreme Court. Accordingly, the decisions in *United Serv. Life Ins. Co.* v. *Delaney*, 328 F.2d 483 (5th Cir. 1964),[25] and *Tomiyasu* v. *Golden*, 358 F.2d 651

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24. See *Merritt-Chapman & Scott Corp.* v. *Frazier*, 289 F.2d 849, 853 (9th Cir.), *cert. denied*, 368 U.S. 835 (1961): "[T]he lower court did not abuse its discretion by refusing to stay the proceeding before it. The defendant had already submitted these very issues [of state law] to the District Court and only after an adverse decision solicited the State Court to pass upon them. Justification for the denial of the stay might well be rested on that fact."

25. *Cert. denied*, 377 U.S. 935 (1964), *opinion after stay*, 358 F.2d 714 (5th Cir.), *cert. denied*, 385 U.S. 846 (1966).

(9th Cir. 1966), cannot be viewed as conflicting in any meaningful sense with the lower court's refusal to abstain here. Each is an example of a federal court's declining jurisdiction for reasons that seemed sufficient to itself: *Delaney* turned on the unsettled character of the state law, *Golden* on avoidance of "an unwarranted intermeddling in the procedures of the Nevada courts." (358 F.2d at 655.)

In the present case, the Court of Appeals had the motion to stay under consideration for three months before denying it. Briefs were filed by both Ranch and Kaiser on the abstention question, and a vigorous dissenting opinion was written by Judge Brown. It must be assumed that the majority considered the question thoroughly, and found this to be an inappropriate occasion for abstention. Surely this finding was well within the permissible range of sound judicial discretion.

Moreover, the motion to stay was denied without opinion. It cannot, therefore, be regarded as anything *more* than a discretionary refusal to abstain; it is not an enunciation of a set of principles clearly contrary to those implicit in either *Delaney* or *Golden*. Had the court chosen to write a full-dress opinion to oppose Judge Brown's, there might be reason to discern a conflict with *Delaney*. But no opinion was written and no visible conflict exists.

It cannot be denied, however, that an underlying conflict in philosophy probably does exist between the implications of *Delaney* and the criteria followed by the other circuits in diversity cases where abstention is an issue. Respondent, for one, has no hesitancy in expressing its belief that *Delaney* was wrongly decided; that it rests on principles contrary to those so clearly stated in *Meredith v. Winter Haven*, 320 U.S. 228 (1943),[26] and reaffirmed in

26. "[T]he difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision." 320 U.S. at 234.

Mashuda; and that, with deference, Judge Brown's concurring opinion there and his dissent here, while eloquent pleas for remedial legislation, do not respond adequately to the duty imposed by the diversity jurisdiction.[27] Respondent finds far more palatable these words of Judge Brown, uttered in the not-too-distant past:

> "A United States District Court clothed with power by Congress pursuant to the Constitution is not a mere adjunct to a state's judicial machinery. In entertaining diversity cases it is responding to a constitutional demand made effective by congressional action and, as the recent abstention cases have made so clear, [citing *Mashuda* and the other 1959 cases] it has a constitutional duty to hear and adjudicate. [Citing *Meredith*]"[28]

But it will be time enough to resolve these perhaps inconsistent statements of Judge Brown and these perhaps inconsistent premises in *Delaney* and other circuit cases when a lawsuit arises that adequately presents the issues for review. Here, the absence of an opinion, the clear exercise of permissible discretion, and the other factors assayed in this Brief make the case a most inappropriate one with which to attempt that resolution.

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27. *Delaney* has received almost uniformly unfavorable comment in the law reviews. See, *e.g.*, Agata, *Delaney, Diversity, and Delay: Abstention or Abdication?*, 4 Houston L. Rev. 422 (1966); Note, 40 Tul. L. Rev. 578, 594 (1966); Comment, 45 B.U.L. Rev. 109, 116-18 (1965); Note, 73 Yale L. J. 850, 855-56 (1964). *But see* Note, 38 Temple L. Q. 72, 78 (1964).

28. *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 407 (5th Cir. 1960). See also *Delduca v. United States Fid. & Guar. Co.*, 357 F.2d 204, 206 (1966) (construction of state public works act in diversity case): "That our task is not an easy one or the footing somewhat unsure in the quest for the Florida rule does not make our obligation any less. [Citing *Meredith*, cf. *Delaney*] . . . We must do the best we can utilizing all the currents which indicate the way the *Erie* . . . wind blows."

POINT IV

The Tenth Circuit Has Not Decided Any Question of Federal Law.

That the Tenth Circuit decided *something* when it denied Kaiser's motion to stay cannot, of course, be denied. But what did it decide? It decided that in this diversity case—in which it felt unanimously that the proper conclusion of state law was "inescapable," in which there was no danger of a clash between state policies and paramount federal policies nor of the irritant of an injunction against state officials, in which no disruption of a state administrative program was threatened, in which the plaintiff (if the allegations of the complaint were true) had been the victim of a continuing trespass for nearly two years and could look forward to still more litigation before that tort could be redressed, in which a referral to the state courts would create the hazards of even more protracted litigation and of additional expense and inconvenience, in which the abstention issue was not even raised until after the court had heard and decided the case on the merits, in which the defendant could have avoided the issue in the first place by bringing the appropriate condemnation action in the state court, and in which it felt impelled to exercise its diversity jurisdiction under the congressional mandate and that of this Court in *Meredith* v. *Winter Haven*—it should not abstain.

Was this the decision of an "important question of federal law"?

Perhaps it is true that important questions of federal law in the abstention area remain to be decided by this Court. Perhaps the cross currents in the *Mashuda* and *Thibodaux* opinions must someday be harmonized. Per-

haps the thesis that abstention is *never* proper in diversity cases and that *Thibodaux* itself was wrongly decided[29] must eventually be explored. Perhaps even the doubts about the abstention doctrine in its entirety[30] must ultimately be brought to the surface and either vindicated or placated. But those questions should await the arrival of a case fairly presenting them; a case more unsuitable than this for considering them can scarcely be imagined.

POINT V

The Decision Below Is Clearly Consistent with the Accepted and Usual Course of Judicial Proceedings.

To label the Court of Appeals' refusal to abstain a *departure* from "accepted and usual principles" is to ignore all of the abstention-diversity cases in this Court, including *Thibodaux*. Abstention is the *exception*, not the rule, in diversity suits. Enough has been said in this Brief to show that the requisite "exceptional circumstances" do not exist.

Suppose this Court did exercise its supervisory power —what are some of the possible consequences? At best, assuming a remand to the Tenth Circuit in the fall of 1968, a declaratory judgment by the state trial court might conceivably be rendered by the end of the year. The appeal to the state Supreme Court would certainly not be disposed of in less than six months. Thus, if the state court agreed with the Court of Appeals, the case would finally be remanded to the District Court in the fall of 1969—a lapse of 3½ years from the filing of the complaint to the overruling of the motion to dismiss! Even if the state Supreme Court

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29. See Agata, *supra* note 27, 4 Houston L. Rev. 422, 428 *passim*.

30. See, *e.g.*, *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 423-37 (1964) (Douglas, J., concurring); Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 Tex. L. Rev. 211, 221-25, 229 (1961).

disagreed with the Tenth Circuit, the litigation would not be concluded; the Court of Appeals would then have to consider the inverse-condemnation exclusive-remedy issue raised on the original appeal. Would it be required to abstain on that issue as well? If so, would *another* declaratory judgment action and *another* state-court appeal be necessary?

This litigious nightmare can quickly be made more horrible by considering the post-abstention phase of *Delaney*. The Texas declaratory judgment action was dismissed by the trial court because, it held, the parties were seeking an advisory opinion. The dismissal was successively affirmed by the intermediate court of civil appeals and the Texas Supreme Court.[31] The case then went back to the Fifth Circuit which, more than two years after its abstention, finally decided on the merits.[32] That a similar result might easily obtain in this case is evident from the state Supreme Court's refusal to give advisory opinions.[33] Moreover, the New Mexico Supreme Court has held that the exercise of jurisdiction in a declaratory judgment proceeding is discretionary with the trial court, particularly where the issue is pending in another lawsuit between the same parties.[34]

Consequently, there is no assurance whatever—indeed, there is considerable indication to the contrary—that the issue raised in Kaiser's last-minute declaratory judgment

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31. *United Serv. Life Ins. Co.* v. *Delaney*, 396 S.W.2d 855 (Tex.), *affirming* 386 S.W.2d 648 (Tex. Civ. App. 1965).

32. *United Serv. Life. Ins. Co.* v. *Delaney*, 358 F.2d 714 (5th Cir.), *cert. denied*, 385 U.S. 846 (1966).

33. See *Bell Tel. Labs., Inc.* v. *Bureau of Rev.*, 78 N.M. 78, ____, 428 P.2d 617, 623 (1966), *appeal dismissed*, 388 U.S. 457 (1967); *City of Carlsbad* v. *Ballard*, 71 N.M. 397, 399, 378 P.2d 814, 815 (1963).

34. *Allstate Ins. Co.* v. *Firemen's Ins. Co.*, 76 N.M. 430, 415 P.2d 553 (1966). Compare the similar holding under the federal act, *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491 (1942).

suit would be decided by the state courts at all, even if this Court *did* order abstention. If not, then after a lengthy delay the Court of Appeals' original ruling would have to stand, and this trespass action would finally return to the District Court for trial and, no doubt, another round of appeals. Meanwhile, the water continues to flow through the illegal pipeline.

The possibilities implicit in "an exercise of this Court's power of supervision" are strongly reminiscent of Mr. Justice Brennan's dissenting observation in *Thibodaux*:

> "I think it is more than coincidence that both in this case and in *Mashuda* the party supporting abstention is the one presently in possession of the property in question. . . . One must regret that this Court's departure from the long-settled criteria governing abstention should so richly fertilize the Power and Light Company's strategy of delay which has now succeeded, I dare say, past the fondest expectation of counsel who conceived it." 360 U.S. at 43-44.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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